

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADAFILED
99 SEP 15 AM 11:54
LANDELL WILSON
CLERK

JIMMIE DAVIS

Petitioner

CASE NO. CV-N-99-137-ECR (PMA)

v.

JOHN IGNACIO et al.

RESPONSE TO RESPONDENTS
OPPOSITION TO PETITIONERS
SUPPLEMENTAL POINTS AND
AUTHORITIES.

Petitioner now submits a response to Respondents
opposition to petitioners supplemental points and
authorities submitted on the 7th day of September 1999
and received by petitioner on 9-9-99.

pursuant to the courts order dated THE 30th DAY
OF JULY 1999. petitioner submits his reply within the
allowed 10 days. DATED THIS 13th day of Sept
1999.

Petitioner has shown cause, prejudice and a
miscarriage of justice. Petitioner has diligently
tried to raise his claim Ground 2(d) in his original
petition sent to his attorney to be supplemented in
his original petition see Exhibit pg 34 of dated letters.
of petitioners supplemental points and authorities.

Jimmie Davis
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CARSON CITY NEVADA
89102

1 But counsel would not file it, so petitioner tried to file
 2 it on his own and ~~it was~~ it was sent back because
 3 in Nevada you are not allowed to file anything if you
 4 have an attorney of record see attached exhibit # pg
 5 7-8. Petitioner then sought father and took counsel
 6 to the bar by writing a formal complaint complaint
 7 # 6 File 91-101-11. Counsel was not acting as counsel
 8 but was deliberately violating petitioner's rights. Just as
 9 counsel was ineffective for never explaining the elem-
 10 ents of the crime counsel was also ineffective for
 11 not filing petitioner's claim but just used the affidavits.
 12 Counsel was the impediment. Responders argue that
 13 petitioner could have raised claim in first petition
 14 instead of the second. Well petitioner did petitioner
 15 send his supplemental writ before the original
 16 petition was decided.

17 Respondent also argue that petitioner
 18 has no right to effective assistance of counsel
 19 on postconviction. Petitioner cites Murray v. Garner
 20 106 S Ct 2639 at 2647 [5-6] we hold that counsel's
 21 Failure to raise a particular claim on appeal is to
 22 be scrutinized under the cause and prejudice
 23 standard when that failure is treated as a
 24 procedural default by the state courts.
 25 Attorney error short of ineffective assistance
 26 of counsel does not constitute cause for
 27 procedural default even when that default
 28 occurs on appeal. To the contrary cause for

1 procedural defect on appeal ordinarily requires
 2 a showing of some external impediment preventing
 3 counsel from constructing or raising the claim.
 4 Here it was counsel who impeded the defense
 5 petitioner exhausted every avenue he had to
 6 try and get counsel to file the issue from the
 7 court to the bar. Counsel was fully ~~in~~ effective
 8 Citing MURRAY v. CHARRIER 106 S.Ct. 2639 (1986) [8]
 9 [There is an additional safeguard against miscarriages
 10 of justice in criminal ~~cases~~ cases, and one not
 11 yet recognized in state criminal trials when many
 12 of the opinions on which the concurrence relies
 13 were written. That safeguard is the right to
 14 effective assistance of counsel, which, as this
 15 Court has indicated, may in a particular case
 16 be violated by even an isolated error of
 17 counsel if that error is sufficiently
 18 egregious and prejudicial. UNITED STATES
 19 v. CRONIC, 466 U.S. 648, 657, n. 20, 104 S.Ct. 2039,
 20 2046, n. 20, 80 L.Ed.2d 657 (1984). See also
 21 STRICKLAND v. WASHINGTON, 466 U.S. at 693-696,
 22 104 S.Ct. at 2067-2069.] [9] EVITTs v. LUCEY,
 23 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)
 24 (right to effective assistance of counsel
 25 applies on an appeal as of right).
 26 IN THIS case before the court petitioner
 27 tried to raise his claim and alert the court
 28 of the violation counsel was constitutionally

1 ineffective.

2 Respondents argue that DAVIS cannot
3 PREVAIL on a MISCARriage of Justice claim
4 because he has FAILED TO SHOW THAT He is
5 ACTUALLY INNOCENT OF THE crime. Petitioner
6 now submits U.S. v. FRADY 162 Sct. 1584 (1982)
7 page 1604¹⁰ [I certainly agree with the court of
8 appeals that A clear miscarriage of Justice has
9 occurred if [Respondent] was guilty of manslaughter
10 and is now serving the penalty for murder¹¹
11 204 U.S. APP. D.C. 234, 240, 636 F.2d 506, 512 (1980)

12 MURPHY v. CARRIER 106 Sct 2637 (1986) page 2645
13 Similarly, if the procedural default is the result
14 of ineffective assistance of counsel the sixth
15 Amendment itself requires that responsibility for
16 the default be imputed to the state, which may
17 not conduct trials at which persons who face
18 incarceration must defend themselves without
19 adequate legal assistance. Cuyler v. SULLIVAN,
20 446 U.S. 335, 344, 100 Sct. 1708, 1716, 164 L. ED 2d 333
21 (1980). Ineffective assistance of counsel, then
22 is cause for a procedural default.

23 These errors infected petitioner's entire
24 proceedings with errors of constitutional dimensions.

25

26

27

28

Counsel did no investigation to find out how
old his client was so that he new to
challenge the Jurisdiction but instead

1 waited until it was too late, Found out that his
 2 client was under age and to ~~figure~~ figure things
 3 out postponed sentencing for 2 months sending
 4 numerous people to see appellant to see if appellant
 5 was lying about his age after he had already been in an
 6 adult jail for months scrutinized, demoralized,
 7 and dehumanized.

8
 9 For the reasons set forth above petitioner
 10 respectfully request that the honorable court
 11 not dismiss Ground II (d).

Respectfully Submitted

JIMMIE DAVIS 27362

Jimmie DAVIS 27362

P.O. Box 607

CARSON CITY NEV

89702

CERTIFICATE OF MAILING

JIMMIE DAVIS SAYS:

on the 13 day of sept 1999, I deposited in
the mail one original and copys to THE BELOW
LISTED ADDRESSES:

CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA
400 SOUTH VIRGINIA ST. ROOM 301
RENO NEVADA 89501

1030
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 E. WASHINGTON AVENUE, SUITE 3900
LAS VEGAS NEVADA 89101

DATED THIS 13 DAY OF sept 1999

Jimmie Davis 27362
JIMMIE DAVIS 27362
NEVADA STATE PRISON
P.O. BOX 607
CARSON CITY NEVADA
89702

**Rule 7.40. Appearances; Substitutions; Withdrawal or
Change of Attorney.**

(a) When a party has appeared by counsel, he cannot thereafter appear on his own behalf in the case without the consent of the court. Counsel who has appeared for any party [shall] must represent that party in the case and shall be recognized by the court and by all parties as having control of his client's case. The court in its discretion may hear a party in open court although the party is represented by counsel.

(b) Counsel in any case may be changed only:

(1) When a new attorney is to be substituted in place of the attorney withdrawing, by the written consent of both attorneys and the client, all of which [shall] must be filed with the court and served upon all parties or their attorneys who have appeared in the action, or

(2) When no attorney has been retained to replace the attorney withdrawing, only by order of the court, [at such time as may be fixed by the court in an order shortening the time for the hearing of the motion] granted upon written motion therefor, and

(i) If the application is made by the attorney, he [shall] must include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and he [shall] must serve a copy of the application upon the client and all other parties to the action or their attorneys, or

(ii) If the application is made by the client, he [shall] must state in the application the address at which he may be served with notice of all further proceedings in the case in the event the application is granted, and [shall] must serve a copy of the application upon his attorney and all other parties to the action or their attorneys.

(c) No application for withdrawal or substitution [shall] may be granted if a delay of the trial or of the hearing of any other matter in the case would result.

REASON FOR CHANGE - Rule 7.40(b)(2) - To remove the requirement for an order shortening time.